(26,272)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 805.

L. G. CALDWELL AND J. A. DUNWODY, COPARTNERS, TRADING AS CALDWELL AND DUNWODY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

Byron S. Adams & Detweiler (Inc.), Printers, Washington, D. C., December 29, 1917.

1 Court of Claims.

No. 32439.

L. G. CALDWELL and J. A. DUNWODY, Copartners, Trading as CALDWELL AND DUNWODY,

vs.

THE UNITED STATES.

I. *Proceedings Had in Case Before Final Hearing.*

The claimants filed their original petition herein on March 22, 1913.

On August 21, 1913 the defendant filed a demurrer to said petition.

On March 6, 1917 the demurrer was argued and submitted.

On March 19, 1917 the demurrer was sustained, with leave to claimants to amend their petition within sixty (60) days, with an opinion by Judge Barney.

On April 30, 1917 the claimants filed their amended petition, which is as follows:

2 II. *Amended Petition.*

Filed April 30, 1917.

To the Honorable Chief Justice and Judges of the Court of Claims:

The amended petition of L. G. Caldwell and J. A. Dunwody respectfully represents:

I.

The petitioners are citizens of the United States and during all of the year 1906 were, and ever since have been, citizens and bona fide residents of the State of Colorado.

II.

By virtue of the Act of Congress entitled "An Act authorizing the citizens of Colorado, Nevada, and the Territories, to fell and remove timber on the public domain for mining and domestic purposes," approved June 3, 1878 (20 Stat., 88), the petitioners were authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public mineral lands in said State of Colorado.

3 III.

And by virtue of the Act of Congress entitled "An Act to amend section eight of an act approved March 3, 1891, entitled 'An Act to

repeal timber-culture laws and for other purposes,'" approved March 3, 1891 (26 Stat., 1093), the petitioners were authorized and entitled to cut and remove from the public timber lands, timber for use in said State of Colorado, for agricultural, mining, manufacturing, or domestic purposes.

IV.

On January 4, 1906, the petitioners were appointed timber agents of the Denver, Northwestern and Pacific Railway Company for the purpose of cutting and manufacturing railroad ties from timber on public lands adjacent to the line of railroad then under construction by said company in Grand County, Colorado, under authority of the Act of Congress of March 3, 1875, granting right of way for railroads through the public domain and authorizing the taking of timber from public lands for construction purposes.

V.

The manufacture of railroad ties from growing timber leaves tops of the trees cut for the purpose and small trees cut in making necessary roads, all known as tie slash, which can be cut up into posts, poles, mine props, etc., and in adjusting the compensation to be paid the petitioners by said railway company for their services in cutting, manufacturing and delivering such railroad ties, the amount to be realized by the petitioners from the utilization and sale of
4 the tie slash from the trees to be cut was estimated and regarded and a rate of compensation per railroad tie agreed upon less than would otherwise have been fixed, and it was understood and agreed between the petitioners and said railway company that the petitioners should be entitled to and have such tie slash, and under the laws of the United States the petitioners were entitled thereto.

VI.

Thereafter, and prior to October 10, 1906, the petitioners manufactured and delivered to said railway company 88,787 railroad ties cut from growing timber on public land in townships 2 South, Range 75 West, and 2 South, Range 76 West, of the 6th Principal Meridian adjacent to the line of said railway company's railroad, and designated for the purpose by the Commissioner of the General Land Office through his subordinate, the chief of field division at Denver in said State, which said ties, as the petitioners are informed and believe, were used by the said railway company in the construction of its said railroad; and that the said cutting of timber for the manufacture of the said ties left a large amount of tie slash severed from the realty.

VII.

The petitioners are informed and believe that all of the said lands from which growing timber was cut as aforesaid, were public non-mineral timber lands, but the petitioners are advised, and therefo

aver, that whether the said lands were mineral or non-mineral in character, petitioners, under the said acts of March 3, 1875, June 3, 1878, and March 3, 1891, or one or more of them, became entitled to the said tie slash and, after the same was severed from the realty as aforesaid, were the owners thereof.

5

VIII.

On October 10, 1906, the petitioners received the following letter of authority from the Chief of Field Division of the General Land Office:

"DENVER, COLO., Oct. 10, 1906.

"Caldwell & Dunwody, Arrow, Colo.

"SIR: As per instructions of the Commissioner of the General Land Office, you are hereby granted authority as agent of the Denver, Northwestern & Pacific Railway, to cut timber under Act of Congress of March 3, 1875, upon the public lands, to sell and dispose of tops and lops of trees that you may cut for construction of said road, which cannot be used by said road for construction purposes.

"Before selling the same you must inquire of the proper officers of the said Denver, Northwestern & Pacific Railway if they will purchase said tops and lops that you may have on hand.

"You must also carefully pile the brush so as to avoid danger of destruction of public timber by forest fires, as heretofore instructed. You will report to this office from time to time the character and amount of timber sold under this authority, and to whom sold.

"I herewith quote the instructions to this office from the Commissioner of the General Land Office:

"'It is incumbent upon your office to see to it that all contractors employed by the said R. R. Co. shall cut timber strictly in accordance with the rules and regulations; they shall confine their cutting strictly to such timber as is needed by the railroad company, and such "refuse" as results from such cutting may be disposed of by the railroad company or by the contractors without violation of existing law.

"'Where it is found that a contractor has violated the law
6 in that he has cut or sold timber other than that described above, prompt and effective action should be taken on your part to the extent of requiring the railroad company to nullify his contract, or to notify the railroad company that you will no longer recognize his agency and thereafter proceed against him as in ordinary cases of timber trespass.'

Very respectfully,

(Signed) N. J. O'BRIEN,

"Chief Field Division, G. L. O."

IX.

Upon the faith of said letter of authority and the verbal assurance of said Chief of Field Service that they were entitled to the said tie slash theretofore cut (and the petitioners are advised that under the laws aforesaid they were entitled to the same and were the owners

thereof), the petitioners on the same day entered into a further contract with said railway company to manufacture and deliver to said railway company 150,000 additional railroad ties to be cut from said public lands in said two townships adjacent to the line of said railroad, the compensation of the petitioners being fixed and agreed upon at a low rate per tie with the understanding that the petitioners were, and would be, the owners of the slash from such tie cutting theretofore done and thereafter to be done and have the benefit of the salvage therefrom.

X.

Thereafter and during the fall and early winter of 1906 the petitioners, pursuant to said second contract with said railway company, manufactured and delivered to said company 132,428 ties cut from growing timber on public lands in said two townships adjacent to the line of said railroad, and said ties, as petitioners are informed and believe, were used by the said railroad company in the construction of its said line.

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XI.

The cutting of timber for the manufacture of said last mentioned ties left a further large amount of tie slash severed from the realty and the petitioners are advised, and therefore aver, that under the laws aforesaid they had become entitled to the same and were the owners thereof.

XII.

On December 17, 1906, the petitioners agreed to sell to the Fraser River Timber Company, of Denver, Colo., a large amount of such tie slash remaining from the cutting and manufacture of the said two lots of railroad ties, and also entered into a contract with the Leyden Coal Company, of Denver, Colo., to furnish 200 cars of mini-g props to be cut from such tie slash not sold to the said Fraser River Timber Company, giving to each of said purchasers a substantial bond to guarantee delivery, and the petitioners aver that the said Fraser River Timber Company and the said Leyden Coal Company so agreed to purchase said tie slash, or the product thereof, for the purpose of using the same in the said State of Colorado, and that the petitioners intended to utilize the remainder of said tie slash, if any, for the purposes mentioned in the said Acts of 1878 and 1891 and in said State of Colorado.

XIII.

The petitioners cut some of said tie slash into poles on the ground, but by reason of heavy snow during the winter the same could not be gotten out for delivery, and all of said tie slash, whether cut into poles or not, was left on the ground to be handled in the spring.

8

XIV.

Before the snow melted so as to enable the petitioners to resume operations, the land upon which the said ties had been cut was, by

Presidential Proclamation of March 2, 1907, included in the Medicine Bow National Forest. Thereafter the petitioners resumed the cutting of such tie slash into mine props in order to perform their contract with said Leyden Coal Company, and the Fraser River Timber Company attempted to take possession of the portion of such tie slash agreed to be sold to them by the petitioners, but both the petitioners and the said Fraser River Timber Company were stopped by the officers of the Forest Service of the United States, which took the position that the said tie slash belonged to the United States and came under the jurisdiction of the said Forest Service, and that the petitioners had no right or title in or to the same.

XV.

Thereafter the officers of the said Forest Service permitted the petitioners to have and remove the poles which the petitioners had theretofore manufactured from such tie slash and also to have all of the tops and refuse on a so-called fire guard of a width of 250 feet from said railroad extending for a distance of two miles, an area of only about 125 acres, whereas the operations of the petitioners had extended over an area of approximately 3,000 acres. Beyond said previously manufactured poles and the said tie slash on the said so-called fire guard, the officers of said Forest Service, over the protest of the petitioners, refused to allow the petitioners to have any of said tops, or refuse, but took possession of the same and proceeded to and did sell and dispose of them to various persons, the proceeds of which sales were received by the United States through its said officers of said Forest Service and covered into its Treasury.

9 VI.

The petitioners have no knowledge as to the amount received by the United States from the sales so made of said tie slash by the officers of said Forest Service, and under the laws of the United States the officers of the United States are prohibited from giving such information, and such information can be obtained only through the process of this honorable court, but the petitioners aver that the value of said tie slash so taken and disposed of by the officers of said Forest Service was and is $26,454.90.

VII.

The petitioners heretofore applied to the said Forest Service of the United States for reimbursement or payment to them, the petitioners, of all sums received by the United States from the sale of said tie slash to which the petitioners were entitled and of which they were deprived by the said Forest Service, but such application was denied by the Forester under date of December 8, 1910.

VIII.

The premises considered, the petitioners pray judgment against the United States in this behalf for the sum of $26,454.90, or such

other sum as may be found to be the amount received by the United States from the sale of said tie slash by the officers of said Forest Service.

CALDWELL & DUNWODY.
By L. G. CALDWELL.

CLARK, PRENTISS & CLARK,
Attorneys for Claimants.

10 STATE OF COLORADO,
City and County of Denver, ss:

L. G. Caldwell, being duly sworn, deposes and says that — is one of the claimants mentioned in the foregoing petition by him subscribed; that he has read the said petition and knows the contents thereof and that the matters and things therein set forth are true to the best of his knowledge and belief.

L. G. CALDWELL.

Subscribed and sworn to before me this 12th day of April, A. D. 1917.

[SEAL.] WILLIAM B. RODDA,
Notary Public.

11 III. *Demurrer to Amended Petition.*

Filed June 5, 1917.

The defendant, by its Attorney General, demurs to the amended petition filed in this cause on the 30th day of April 1917, upon the following grounds:

First. That the court has not jurisdiction of the action.

Second. That the amended petition does not state facts sufficient to constitute a cause of action.

HUSTON THOMPSON,
Assistant Attorney General.
RICHARD P. WHITELEY,
Assistant Attorney.

IV. *Argument and Submission of Demurrer.*

On October 29, 1917 the defendant's demurrer to the claimants' amended petition was argued by Mr. Richard P. Whiteley, for the defendant, and Mr. William C. Prentiss, for the claimants, and the demurrer was submitted.

12 V. *Opinion of the Court.*

Filed December 3, 1917.

BARNEY, *Judge*, delivered the opinion of the court:

The question for decision in this case arises from the demurrer of the defendants to the amended petition herein of the plaintiffs.

A demurrer was interposed to the original petition, which was sustained by this court with an opinion March 19, 1917. As the amended petition contains all of the averments of the original petition and more, the opinion on the first demurrer will be withdrawn and this opinion stand as the opinion upon both demurrers.

The facts set forth in the petition as amended are substantially as follows: The plaintiffs, in June, 1906, were the timber agents of the Denver, Northwestern & Pacific Ry. Co., for the purpose of cutting and manufacturing railroad ties on the public lands adjacent to the line of said railway then under construction in Colorado to be used and which were used in the construction of said railway under the authority of the act of Congress of March 3, 1875 (18 Stat., 482). As a part of the consideration for the labor of cutting and manufacturing said ties said railway company agreed to give to the plaintiffs all the tops or "tie slash" of the trees cut down for that purpose. Pursuant to said contract and prior to October, 1906, the plaintiffs manufactured and delivered to said railway company 88,797 ties, leaving a large amount of said tie slash. On October 10, 1906, the plaintiffs received the following letter from an officer of the General Land Office:

"DENVER, COLO., Oct. 10, 1906.

"Caldwell & Dunwody, Arrow, Colo.

"SIR: As per instructions of the Commissioner of the General Land Office, you are hereby granted authority as agent of the Denver, Northwestern & Pacific Railway to cut timber under act of Congress of March 3, 1875, upon the public lands, to sell and dispose of tops and lops of trees that you may cut for construction of said road, which can not be used by said road for construction purposes.

13 "Before selling the same you must inquire of the proper officers of the said Denver, Northwestern & Pacific Railway if they will purchase said tops and lops that you may have on hand.

"You must also carefully pile the brush so as to avoid danger of destruction of public timber by forest fires, as heretofore instructed. You will report to this office from time to time the character and amount of timber sold under this authority, and to whom sold.

"I herewith quote the instructions to this office from the Commissioner of the General Land Office:

" 'It is incumbent upon your office to see to it that all contractors employed by the said R. R. Co. shall cut timber strictly in accordance with the rules and regulations; they shall confine their cutting strictly to such timber as is needed by the railroad company, and such "refuse" as results from such cutting may be disposed of by the

railroad company or by the contractors without violation of existing law.

"'Where it is found that a contractor has violated the law in that he has cut or sold timber other than that described above, prompt and effective action should be taken on your part to the extent of requiring the railroad company to nullify his contract, or to notify the railroad company that you will no longer recognize his agency and thereafter proceed against him as in ordinary cases of timber trespass.'

"Very respectfully,

"(Signed) N. J. O'BRIEN,
"Chief Field Division, G. L. O."

Thereafter the plaintiffs entered into a further contract with said railway company to cut and manufacture for it additional ties upon the public lands on the same terms as above stated and under which latter contract they did manufacture and deliver to said railway company a considerable number of ties which were also used in the construction of said railway, leaving a further amount of tie slash. In December, 1906, the plaintiffs agreed to sell to the Fraser River Timber Company, of Denver, Colo., a large amount of said tie slash; also to sell to the Leyden Coal Company, of the same place, 200 cars of mining props, the same to be cut by the plaintiffs from said tie slash, all the tie slash so sold to be used in the State of Colorado.

The plaintiffs also aver that they intended to utilize the remainder of said tie slash for purposes mentioned in the acts of 1878 and 1891 hereinafter quoted.

March 2, 1907, the land upon which said ties had been cut was, by presidential proclamation, included in the Medicine Bow National Forest. Thereafter the officers of the Forest Service allowed the plaintiffs to remove the poles which they had already cut from said tie slash together with the tie slash on a so-called "fire yard" 200 feet wide along said railway for a distance of two miles, but refused to allow them the remainder of said tie slash, but took possession of the same, sold it, and the proceeds were covered into the United States Treasury. This suit is brought to recover the sum of such proceeds.

The defendants demur to the petition upon the grounds (1) that this court is without jurisdiction, (2) that the petition does not state the cause of action.

The jurisdiction of this court is attacked upon the ground that the facts alleged show, if they show any cause of action at all
14 (which is denied), it is in tort and not upon contract either express or implied.

That money belonging to a citizen which has reached the United States Treasury, whether through the trespass and wrongdoing of an officer of the United States or not, can be recovered in this court was decided by this court in Thayer v. United States, 20 C. Cls., 137. The same question arose in The State Bank v. United States, 10 C. Cls., 519, where the same doctrine was held, and was affirmed by the Supreme Court on appeal. 96 U. S., 30.

These cases would seem to settle the question of jurisdiction, but

as the demurrer is sustained upon other grounds it is not necessary to decide that qestion. Hence the question here decided is whether the plaintiffs ever had any title to the tie slashings in question, for if not, of course they never had any right to the proceeds, wherever they may be. The railway company, through its agents, cut and manufactured the ties under the right conferred by the act of March 3, 1875, supra, which provides:

"That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road material, earth, stone, and timber necessary for the construction of said railroad." * * *

The plaintiffs argue that the grant to the railway of timber for construction purposes carried the right to the whole tree when cut down though only a part of it may be used for railroad construction. Such a construction of the statute would open the door to many abuses. The railway might slash down all of the valuable timber along its right of way, use a trifling part of it for its construction, and sell the remainder. If needed for that purpose, the railway could have used the tie slash in its further construction, but we think it acquired no title to the same for the purpose of traffic. The same became liable to be appropriated for certain purposes by citizens of the State of Colorado under another statute, which will be hereafter quoted and construed.

Statutes granting privileges or relinquishing rights of the public are to be strictly construed against the grantee. Wisconsin Central Ry. v. United States, 164 U. S., S. C., 27 C. Cls., 440. Nothing passes by the grant but what is conveyed in clear and explicit language United States v. Oregon, etc., Ry., 164 U. S., 529. As a further example of the strict construction to be given to this statute, we refer to the case of United States v. Denver, etc., Ry., 150 U. S., 1, where it is said:

"This court does not mean to be understood as holding that the defendant under the act of 1875 has the right to use the timber taken from the public lands for the purpose of constructing rolling stock or equipment employed in its transportation business."

This question came before the court in the case of United States v. Denver, etc., Ry. Co., 190 Fed. Rep., 825, 826, and it was there held that the railway company acquired no title to such tops, and we think the doctrine therein announced was sound. Under this decision the said railway company never acquired any title to the tie slash in question, and hence could not confer any on the plaintiffs.

But the plaintiffs rely upon the letter quoted from an officer of the Land Office, in effect making a gift to them of the same. We do not think such officer had any authority to bestow such gift. It has been repeatedly held by this and other courts that, unless expressly authorized thereto by Congress, no officer of the United States has

authority to give away the property of the Government. Steel v. United States, 113 U. S., 128; Flores v. United States, 18 C. Cls., 352.

It would indeed lead to favoritism and rank injustice if an officer of the Land Office could select parties who should receive timber upon the public domain, for if he could exercise such discrimination as to this tie slash he could exercise the same discrimination as to standing timber to which certain citizens are entitled as provided under another statute about to be quoted.

To maintain their title to the tie slash in question the plaintiffs further rely upon the act of March 3, 1891, 26 Stat., 1095, 1099, which provides as follows:

"And in the States of Colorado, Montana, Idaho, North Dakota and South Dakota, Wyoming, and in the District of Alaska and the gold and silver regions of Nevada, and the Territory of Utah, in any criminal prosecution or civil action by the United States for a trespass on such public timberlands or to recover timber or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timberlands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes, and has not been transported out of the same." * * *

Under this act it was clearly never intended to give citizens the right to traffic in the timber upon the public lands, no matter what use may have been the purpose to make of it. This act was construed by Assistant Attorney General Van Devanter, now Justice of the Supreme Court, in an opinion to the Secretary of the Interior November 27, 1899, in volume 29, Decisions of the Department of the Interior relating to Public Lands, page 322. He said:

"There is nothing in this act which suggests that it was the purpose of Congress to thereby authorize or provide for the sale of timber on the public lands. As gathered from a careful examination of the terms of the act, its purpose seems to have been to modify the law relating to the cutting and removal of timber from lands of the United States by denying to the Government the right then existing to demand a conviction in the criminal prosecution, or a recovery in a civil action when in any of the States, Territories, or regions named, timber is cut or removed from the public timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes under the rules and regulations made and prescribed by the Secretary of the Interior, and is not transported out of that State or Territory. * * *

"I am of the opinion that the legislation under consideration does not authorize the sale of timber, and inasmuch as the regulations of March 17, 1898, supra, provide for sales thereof, I advise that

16 said regulations be reformed and brought within the authority given the Secretary of the Interior by the statute under which they were prescribed."

In accordance with this opinion the Secretary of the Interior issued rules and regulations governing the appropriation of timber under this act, as he was authorized to do by its terms and, among other things, directed that "the cutting or removal of timber or lumber to an amount exceeding stumpage value of $50 in any one year will not be permitted except upon application to the Secretary of the

Interior and after the granting of a special permit." This opinion and these regulations will show the absurdity of maintaining that under this statute the plaintiffs could acquire title to timber of the value of $26,454.90, which is the value placed by the plaintiffs upon the tie slash, the possession of which they were deprived, and acquire the title for the purpose of selling it to other parties.

It should be here remarked that said act of March 3, 1891, contains a provision that "nothing herein contained shall operate to enlarge the rights of any railway company to cut timber upon the public domain."

The act of June 3, 1878, does not enter into the discussion of this case, as it is averred in the petition that the timber in question was cut on nonmineral land, and the act is applicable solely to public mineral lands; and also expressly provides that it shall not extend to railroad corporations.

It is unnecessary to proceed further with the discussion of this branch of the case, as it is clear that the plaintiffs must rely alone upon their rights acquired from the railroad company under the act of 1875.

It follows from the foregoing that the demurrer to the petition as amended should be and the same is hereby sustained and the petition dismissed.

Hay, Judge; Downey, Judge; Booth, Judge, and Campbell, Chief Justice, concur.

17 VI. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Third day of December, A. D., 1917, it was ordered that the demurrer to the claimants' amended petition be sustained, and that the amended petition of the claimants, L. G. Caldwell and J. A. Dunwody, Copartners trading as Caldwell and Dunwody, be and the same is hereby dismissed.

BY THE COURT.

VII. *Claimants' Application for and Allowance of Appeal.*

Come now the claimants, by their attorneys, and make application to the Court for the allowance of an appeal to the Supreme Court of the United States from the decree of this court dismissing the petition herein, and, as cause, show that the amount involved in the cause is more than three thousand dollars.

CLARK, PRENTISS & CLARK,
Attorneys for Claimants.

Filed December 11, 1917.

Ordered: That the above appeal be allowed as prayed for.

BY THE COURT.

December 11, 1917.

18 In the Court of Claims.

No. 32439.

L. G. CALDWELL and J. A. DUNWODY, Copartners, Trading as CALDWELL AND DUNWODY,

vs.

THE UNITED STATES.

I, Sam'l A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the opinion of the Court; of the judgment of the Court; of the claimants' application for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims at Washington City this Thirteenth day of December, A. D. 1917.

[Seal Court of Claims.]

SAMUEL A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26,272. Court of Claims. Term No. 805. L. G. Caldwell and J. A. Dunwody, copartners, trading as Caldwell & Dunwody, appellants, vs. The United States. Filed December 27th, 1917. File No. 26,272.

Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 285.

L. G. CALDWELL AND J. A. DUNWODY, CO-PARTNERS, TRADING AS CALDWELL AND DUNWODY, APPELLANTS,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANTS.

WILLIAM C. PRENTISS,
Attorney for Appellants.

J. D. MILLAN & SONS, 20 Eighth Street, N. W., Washington, D. C.

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Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 325.

L. G. CALDWELL AND J. A. DUNWODY, CO-PARTNERS, TRADING AS CALDWELL AND DUNWODY, APPELLANTS,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANTS.

Statement.

This case is here upon appeal from the judgment of the Court of Claims sustaining the defendant's demurrer to, and dismissing, the Claimant's Amended Petition.

The Amended Petition set up, in substance:

That the petitioners (appellants here) were citizens and bona fide residents of the State of Colorado (Par. I).

That on January 4, 1906, the appellants were appointed timber agents of the Denver, Northwestern and Pacific Railway Company for the purpose of cutting and manufacturing railroad ties from timber on public lands

adjacent to the line of railroad (Moffatt Road) then under construction by said Company in Grand County, Colorado, under authority of the act of March 3, 1875, granting right of way for railroads through the public domain and authorizing the taking of timber from public land adjacent for construction purposes (Par. IV).

The manufacture of railroad ties from growing timber leaves tops of the trees cut for the purpose and small trees cut in making necessary roads, all known as tie slash, which can be cut up into posts, poles, mine props, etc., and that in adjusting the compensation to be paid the appellants by the said railway Company for cutting, manufacturing and delivering such railroad ties, the amount to be realized by the appellants from the utilization and sale of the tie slash was estimated and regarded and a rate of compensation per tie agreed upon less than otherwise would have been fixed, and that it was understood and agreed between the appellants and the Railway Company that the petitioners should be entitled to and have such tie slash (Par. V).

That thereafter and prior to October 10, 1906, the appellants manufactured and delivered to the Railway Company 88,787 railroad ties cut from growing timber on public land in Townships 2 South, Range 75 West, and 2 South, Range 76 West, of the Sixth Principal Meridian, adjacent to the line of said railroad, and designated for the purpose by the Commissioner of the General Land Office through his subordinate, the chief of field division at Denver, and that said cutting left a large amount of the slash severed from the realty (Par. VI).

That the appellants were informed and believed that all of said lands were public non-mineral timber lands (Par. VII).

That on October 10, 1906, the appellants received the following letter of authority from said chief of field division (Par. VIII):

"Denver, Colo., Oct. 10, 1906.

"Caldwell & Dunwody,

"Arrow, Colo.

"Sir:—

"As per instructions of the Commissioner of the General Land Office, you are hereby granted authority as agent of the Denver, Northwestern & Pacific Railway, to cut timber under Act of Congress of March 3, 1875, upon the public lands, to sell and dispose of tops and lops of trees that you may cut for construction of said road, which cannot be used by said road for construction purposes.

"Before selling the same you must inquire of the proper officers of the said Denver, Northwestern & Pacific Railway if they will purchase said tops and lops that you may have on hand.

"You must also carefully pile the brush so as to avoid danger of destruction of public timber by forest fires, as heretofore instructed. You will report to this office from time to time the character and amount of timber sold under this authority, and to whom sold.

"I herewith quote the instructions to this office from the Commissioner of the General Land Office:

" 'It is incumbent upon your office to see to it that all contractors employed by the said R. R. Co. shall cut timber strictly in accordance with the rules and regulations; they shall confine their cutting strictly to such timber as is needed by the railroad company, and such "refuse" as results from such cutting may be disposed of by the railroad company or by the contractors without violation of existing law.

"'Where it is found that a contractor has violated the law in that he has cut or sold timber other than that described above, prompt and effective action should be taken on your part to the extent of requiring the railroad company to nullify his contract, or to notify the railroad company that you will no longer recognize his agency and thereafter proceed against him as in ordinary cases of timber trespass.'

Very respectfully,
(Signed) N. J. O'BRIEN,
"Chief Field Division, G. L. O."

That upon the faith of said letter of authority and the verbal assurance of said chief of field division that they were entitled to the tie slash theretofore cut, the appellants on the same day entered into a further contract with said Railway Company to manufacture and deliver 150,000 additional railroad ties to be cut from said public lands in said two townships, the compensation of the appellants being agreed upon and fixed at a low rate per tie with the understanding that they would be the owners of the tie slash from the cutting theretofore done and thereafter to be done and have the benefit of the salvage therefrom (Par. IX).

That thereafter and during the fall and early winter of 1906, the appellants, pursuant to said second contract, manufactured and delivered to said Railway Company 132,428 ties cut from growing timber on public lands in said two townships (Par. X).

That the cutting of timber for the manufacture of said last mentioned ties left a further large amount of tie slash severed from the realty (Par. XI).

That on December 17, 1906, the appellants agreed to sell to a timber company of Denver a large amount of

such tie slash remaining from the cutting and manufacturing of said two lots of railroad ties, and also entered into a contract with a coal company of Denver to furnish 200 cars of mining props to be cut from such tie slash not sold to said timber company, giving to each of said purchasers a substantial bond to guarantee delivery; that the said timber company and said coal company so agreed to purchase said tie slash, or the product thereof, for the purpose of using the same in the State of Colorado; and that the appellants intended to utilize the remainder of said tie slash, if any, for the purposes mentioned in the Acts of June 3, 1878 (20 Stat. 88), and March 3, 1891 (26 Stat. 1093), and in said State of Colorado (Par. XII).

That the appellants cut some of said tie slash into poles on the ground, but by reason of heavy snow during the winter the same could not be gotten out for delivery, and that all of said tie slash, whether cut into poles or not, was left on the ground to be handled in the spring (Par. XIII).

That before the snow melted so as to enable the appellants to resume operations, the land upon which said ties had been cut was, by Presidential Proclamation of March 2, 1907, included in the Medicine Bow National Forest; that thereafter the appellants resumed the cutting of such tie slash into mine props in order to perform their contract with said coal company and the said timber company attempted to take possession of the portion of such tie slash agreed to be sold to them by the appellants, but both the appellants and said timber company were stopped by the officers of the Forest Service (Par. XIV).

That thereafter the officers of the Forest Service permitted the appellants to have and remove the poles which

the appellants had theretofore manufactured, and also to have all of the tops and refuse on a so-called fire guard of a width of 250 feet from said railroad and extending for a distance of two miles, or an area of about 125 acres, whereas the operations of the appellants had extended over an area of approximately 3,000 acres; and that beyond said previously manufactured poles and the tie slash on said fire guard, the officers of the Forest Service, over the protest of the appellants, refused to allow the appellants to have any of said tops or refuse, but took possession of the same and proceeded to and did sell and dispose of them to various persons, the proceeds of which sales were received by the United States and covered into its treasury (Par. XV).

The appellants, waiving the tort, sue for the amount so received by the United States as for money had and received to their use, and claim title through the Railway Company under the act of 1875, and as well, in their own right, under the acts of 1878 and 1891.

Argument.

The Railroad Company Was Entitled to the Tie Slash Incident to Rightful Tie Cutting Under the Act of 1875.

The Act of 1875 grants "also the right to take from the public lands adjacent to the line of said road, material, earth, stone, and *timber necessary for the construction of said railroad.*"

No provision was made in the law with respect to the disposition of portions of trees left after using such portions as might be utilizable for railroad construction purposes. The operation of the act in that regard must, therefore, be sought in reason and analogy.

The Act of 1875 does not stand alone in this respect. Under various laws and conditions similar situations have been presented and uniformly, wherever a right to cut or take "timber" has been recognized, the right to dispose of it as incidental to its cutting or taking has followed.

In U. S. vs. Cook, 19 Wall., 591, this court announced the broad principle, saying:

> "The right of use and occupance by the Indians is unlimited. They may exercise it at their discretion. If the lands in a state of nature are not in a condition for profitable use, they may be made so. If desired for the purposes of agriculture, they may be cleared of their timber to such an extent as may be reasonable under the circumstances. The timber taken off by the Indians in such clearing may be sold by them. But to justify any cutting of the timber, except for use upon the premises, as timber or its product, it must be done in good faith for the improvement of the land. The improvement must be the principal thing, and the cutting of the timber the incident only. Any cutting beyond this would be waste and unauthorized.
>
> "The timber while standing is a part of the realty, and it can only be sold as the land could be. The land can not be sold by the Indians, and consequently the timber, until rightfully severed, can not be. It can be rightfully severed for the purpose of improving the land, or the better adapting it to convenient occupation, but for no other purpose. When rightfully severed it is no longer a part of the land, and there is no restriction upon its sale. Its severance under such circumstances is, in effect, only a legitimate use of the land. In theory, at least, the land is better and more valuable with the timber off than with it on. It has

been improved by the removal. If the timber should be severed for the purposes of sale alone—in other words, if the cutting of the timber was the principal thing and not the incident—then the cutting would be wrongful, and the timber when cut become the absolute property of the United States."

The question as to the right of a homesteader in respect of cutting and selling timber on his homestead first came before this Court in Shiver vs. U. S., 159 U. S., 491. The Court said:

"With respect to the standing timber, his privileges are analogous to those of a tenant for life or years. In this connection, it is said by Washburn in his work upon Real Property (first edition, vol. I, p. 108):

" 'In the United States, whether cutting of any kind of trees in any particular case is waste, seems to depend upon the question whether the act is such as a prudent farmer would do with his own land, having regard to the land as an inheritance, and whether doing it would diminish the value of the land as an estate.

" 'Questions of this kind have frequently arisen in those States where the lands are new and covered with forests, and where they can not be cultivated until cleared of the timber. In such case, it seems to be lawful for the tenant to clear the land if it would be in conformity with good husbandry to do so, the question depending upon the custom of farmers, the situation of the country, and the value of the timber. * * * Wood cut by a tenant in clearing the land belongs to him, and he may sell it, though he can not cut the wood for purposes of sale; it is waste if he does.'

"By analogy we think the settler upon a homestead may cut such timber as is necessary to clear the land for cultivation, or to build him a house, outbuildings, and fences, and, perhaps, as indicated in the charge of the Court below, to exchange such timber for lumber to be devoted to the same purposes, but not to sell the same for money, except so far as the timber may have been cut for the purpose of cultivation. While, as was claimed in this case, such money might be used to build, enlarge, or finish a house, the toleration of such practice would open the door to manifest abuses, and be made an excuse for stripping the land of all its valuable timber. One man might be content with a house worth $100, while another might, under the guise of using the proceeds of the timber for improvements, erect a house worth several thousands. A reasonable construction of the statute—a construction consonant both with the protection of the property of the Government in the land and of the rights of the settler—we think restricts him to the use of the timber actually cut, or to the lumber exchanged for such timber and used for his improvement, and to such as is necessarily cut in clearing the land for cultivation.

"While this question never seems to have arisen in this Court before, in United States vs. Cook (19 Wall., 591)—a suit in trover for the value of timber cut from an Indian reservation—it was held that while the right of use and occupancy by the Indians was unlimited, their right to cut and sell timber, except for actual use upon the premises, was restricted to such as was cut for the purpose of clearing the land for agricultural purposes; that while they were at liberty to sell the timber so cut for the purpose of cultivation, they could not cut it for the purpose of sale alone. In other words, if the cutting of the timber was

> the principal, and not the incident, then the cutting would be unlawful, and the timber when cut become the absolute property of the United States. Their position was said to be analogous to that of a tenant for life, the Government holding the title, with the rights of a remainderman."

In Stone vs. U. S., 167 U. S., 178, the trial Court, in instructing the jury, said:

> "That any settler going upon a tract of land with that intention goes by invitation of the Government and with the authority to improve the land and make it fit for use; that he is authorized to cut down the timber which he finds standing there (if it encumbers the ground), so far as was necessary to do so in order to make the land fit for cultivation; that any timber that he does so cut down in good faith and for the purpose of improving the land, he being a bona fide settler intending to acquire title in accordance with the laws, *is not the property of the United States, but becomes his property after being so cut down, and that he may burn it up or he may sell it for money, and if he sells it under the conditions named, the man who buys it from him gets a good title and is not required to pay the United States for it afterwards.*"

This Court said:

> "It is not, in our judgment, necessary to add anything to this clear and satisfactory statement of the law as applicable to the matters referred to by the trial Court. They are in accord with the views of this court, as expressed in Shiver vs. United States (159 U. S., 491, 497, 498). See also United States vs. Cook (19 Wall., 591)."

The same principle is recognized as likewise applying to Indian allotments and mining claims (Circular, 27 L. D., 366, par. 13; Opinion, 30 L. D., 88).

In all of these instances the right to cut the timber is raised as an incident and carries with it the vesting of title in the occupant to timber so lawfully cut.

The right of a railroad company to take timber for construction purposes is an express grant. Taking "timber necessary for the construction of its railroad" contemplates the taking of *trees.*

In the United States Statutes the word "timber" used collectively signifies standing trees (28 Enc., 2d Ed., 537, and cases cited).

In the absence of any express provision as to the disposition of lops and tops or other surplus, the principles recognized in the cases of Indian occupants, homesteaders, and mineral claimants furnish the only reasonable solution.

As said by this Court in U. S. vs. Cook, *supra,* (in 1874, shortly prior to the passage of the Act of 1875): "When rightfully severed it is no longer a part of the land, and there is no restriction upon its sale."

A homesteader or Indian occupant may cut timber for two purposes: First, to clear the land for cultivation, in which case the timber cut becomes his property; second, not to clear the land for cultivation but to construct his house or other improvements, in which case there might be surplus not needed for the purpose, but which becomes his property and may be disposed of by him.

Under date of July 15, 1881, the Interior Department issued instructions to govern registers and receivers and special agents in determining the rights of railroad companies in respect to taking material, earth, stone, and tim-

ber (see 8 Copp's Land Owner, p. 94), but did not include therein any directions in regard to any surplus not needed for construction purposes.

In instructions of June 30, 1882, under the Act of June 3, 1878, authorizing the taking of timber from mineral lands, it was said (9 Copp's Land Owner, p. 100):

> "2. That no timber less than eight (8) inches in diameter is cut or removed.
>
> "3. That it is not wantonly wasted or destroyed.
>
> "The above regulations apply also to right of way railroad companies, procuring timber for construction purposes from the public lands, under the Act of March 3, 1875.
>
> "Every right of way railroad company, however, obtaining public timber under said act, whether from lands, mineral, or non-mineral in character, must in addition observe the following regulations:
>
> * * * * *
>
> "3. No public timber is permitted to be taken or used in the *repair or improvement* of such road after the original construction of the same.
>
> "4. No public timber is permitted to be taken and used as *fuel* by any railroad."

Paragraphs 3 and 4 were obviously intended merely as interpretation of the term "construction purposes" as not embracing repair or improvement of a constructed road or use for fuel, and mere surplus from lawful cutting was not in contemplation.

On August 29, 1885, the instructions to registers and receivers and special agents regarding the taking of timber by railroad companies were revised and the following inserted (4 L. D., 150):

"10. No growing trees less than eight inches in diameter will be permitted to be cut. No tree can be cut that is not required for use for construction purposes, and all of each tree cut that can be used for construction purposes must be utilized.

"11. The tops and lops of all trees must be cut and piled and the brush removed or disposed of in such a manner as to prevent the spread of forest fires.

* * * * *

"13. Every company, its officers, agents, contractors, and employees, will be held responsible for any unlawful taking of timber or other material and for all waste and damage."

The restriction to trees 8 inches or more in diameter was obviously beyond the power of the department to impose, as the test is statutory, viz., necessity for construction purposes.

U. S. vs. United Verde Copper Co., 196 U. S., 207.

The purpose of paragraphs 10 and 13 was the prevention of waste.

And the purpose of paragraph 11 was not to make any declaration as to ownership of surplus lops or tops, but merely to insist that lops and tops left on the ground as refuse should be cut and piled (and the brush removed or disposed of) in such manner as to minimize the spread of fire.

As, however, the act imposed no duty upon railroad companies in that respect and did not empower the land department to do so, the duty of the companies in the premises is obviously only that imposed by the law upon a licensee, which is to use ordinary care to prevent injury

to the licensor's property (18 Enc., 2d Ed., 1135), and that is a question which the land department cannot control by regulation.

U. S. vs. United Verde Copper Co., *supra;*
U. S. vs. Rossi, 133 Fed., 380.

The land department, however, has general jurisdiction over timber on the public lands (Wells vs. Nickles, 14 Otto, 444; Ops. Atty. Gen., Aug. 23, 1886, 18 Op., 434; and Dec. 31, 1890, 19 Op., 710) and, as a measure beneficial to the Government, could lawfully authorize the taking of the lops and tops in consideration of careful piling of the brush so as to minimize the danger of destruction of other public timber by spread of forest fires, even if the lops and tops did not pass to the railroad company as part of the "timber" which they were authorized to take.

The Court of Claims, in its opinion herein (R., p. 9) has regarded such a transaction as a gift and cited authorities to the point that unless expressly authorized by Congress no officer has authority to give away property of the Government. The same principle extends to sales of Government property, but, nevertheless, this Court held, in Wells vs. Nickles, *supra*, that, in the absence of legislation, the Commissioner of the General Land Office and his subordinates had power to seize and sell timber (and its products) cut by a trespasser, or to compromise with the trespasser.

In a communication from the Commissioner to the Secretary, May 3, 1886, *in re* the case of John H. Linck, general timber agent of the Colorado Midland Ry. Co. (Land Office Annual Report, 1886, p. 446), it was said:

> "When slabs and other surplus material unavoidably accumulate in procuring timber for railroad construction purposes under the Act of March 3, 1875, no objection can be seen to permitting the railroad company to utilize the same to the best advantage, in order to prevent useless waste and destruction, or they might permit *bona fide* settlers along the line of the road to use the same for fencing, building purposes and the improvement of their claims, but in no case should the road or its agent be allowed to make commercial traffic or sale of the same."

It is to be observed that not until the Act of March 3, 1891, was there any authority for settlers in Colorado to take timber from vacant public non-mineral lands, so that to permit, in 1886, a railroad company, in Colorado, to utilize slabs and other surplus material "to the best advantage, in order to prevent useless waste or destruction, or to permit settlers to take it" (which, in effect, would be giving it to them), but to prohibit the company or its agent from making "commercial traffic or sale of the same," was making a distinction without a difference in legal effect.

The intent of the Act of 1875 was to aid and encourage the construction of railroads by donating, *inter alia*, "timber," that is, trees. To limit the grant to such parts of the trees as the railroad could use for construction purposes, would be to restrict and narrow the language of the act.

On the contrary, to permit the railroad companies to use the surplus tops, lops, etc., as an element in adjusting the compensation of agents employed to fell the trees and manufacture therefrom the lumber required for construction purposes is promotive of the policy of the act and in accord with the general policy of the Government.

A few days later, on May 7, 1886 (and on August 5, 1886), there were issued instructions under the Act of June 3, 1878, authorizing the taking of timber from mineral lands for mining and domestic purposes, wherein it was said (Annual Report, 1886, pp. 451, 453):

> "6th. Timber felled or removed shall be strictly limited to building, agricultural, mining, and other domestic purposes within the State or Territory where it grew.
>
> "All cutting of such timber for use outside of the State or Territory where the same is cut, and all removals thereof outside of the State or Territory where it is cut, are forbidden.
>
> "7th. No person will be permitted to fell or remove any growing trees of any kind whatsoever less than 8 inches in diameter.
>
> "8th. Persons felling or removing timber from public mineral lands of the United States must utilize all of each tree cut that can be profitably used, and must cut and remove the tops and brush, or dispose of the same in such manner as to prevent the spread of forest fires."

It is evident that the concern of the land department, carrying out the policy of protecting the timber and undergrowth, was, where trees were cut by authority, express or implied, that the whole of each tree should be disposed of either by removal from the land, or, if any portion (tops and brush) were left on the land, it should be so disposed of (piled or burned) as to prevent the spread of forest fires.

"Brush" is defined as "branches of trees lopped off" (Webster's Dictionary). And "lop," as a verb, is defined as "to hew or cut branches, twigs, or dead or superflous parts of a tree"; and, as a noun, "a part or parts of a

tree lopped off, especially parts not measured for timber; trimmings" (id.).

It is evident that the land department then (1886) regarded tops, lops and brush all as refuse, which, if not removed, should be piled or burned to prevent spread of fire.

In U. S. vs. T. G. Wilson (U. S. Dist. Ct., Wash. Terr'y., June Term, 1889; Land Office Annual Report, 1889, p. 299) it was held:

> "Since a railroad that has been granted a right of way through public lands and has duly complied with the provisions of law is authorized to take timber from the public lands for construction purposes, a party who has taken timber from such lands with the intent at the time to so apply it can not be convicted in an action brought against him by the United States on the ground that in cutting bridge timbers some portion of the slabs which had to be cut off in squaring the timbers had been converted into boards or scantling and sold for other purpose, and that some portion of the timber had, without the fault of the defendant, gone adrift and beyond the control of the defendant, so that the same could not be recovered for use in constructing the railroad and had been afterwards sold for other purposes."

This was a criminal case, but the Court recognized the doctrine of incident as applying to the surplus (slabs) left in sawing out bridge timbers.

And final recognition by the land department that the right to dispose of "refuse" or "surplus" is incidental to the right to take timber for railroad construction purposes is evidenced by the instructions of the Commissioner to the Chief of Field Service at Denver, regarding

the operations of the railway company in question, as follows (Amended Petition, par. VIII):

> "It is incumbent upon your office to see to it that all contractors employed by the said R. R. Co. shall cut timber strictly in accordance with the rules and regulations; they shall confine their cutting strictly to such timber as is needed by the railroad company, and such 'refuse' as results from such cutting may be disposed of by the railroad company or by the contractors without violation of existing law."

A comparison of the language of the several acts authorizing the taking of timber from the public lands, is helpful:

> R. S. 5264: "Any telegraph company * * * shall have the right to take and use * * * the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance and operation of its lines * * *."

> Act of 1875: "Also the right to take * * * material, earth, stone, and timber necessary for the construction of said railroad."

> Act of 1878: "That * * * *bona fide* residents * * * shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any *timber or other trees* growing or being on the public lands being mineral * * *."

This illustrates the use of "timber" in all these statutes as meaning trees that can be manufactured into lumber for construction of buildings, etc. This statute is broader in scope, inasmuch as it contemplates "other trees":

> Act of 1891: "* * * in any criminal prosecution or civil action by the United States for a trespass on such public timber lands, or to recover timber or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed * * * for use * * * for agricultural, mining, manufacturing, or domestic purposes * * * provided that the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act; and he may designate the sections or tracts of land where timber may be cut; and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations."

It will be observed that all of these laws contemplate the taking of trees themselves and in none of them is any notice taken of any surplus not available for the purposes specified.

In 1886 four Chinamen were, in the United States District Court at Boise City, Idaho, convicted of timber trespassing on public mineral lands (Act of 1878) *for failing to utilize all of each tree that could profitably be used.* See Land Office Report for 1887, p. 480.

In the Timber and stone Act of June 3, 1878 (20 Stat., 89), providing for the sale of timber and stone lands in specified States and prohibiting the cutting of timber from lands of the United States therein, it was provided "That nothing herein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements" * * *.

Here is statutory language substantially the equivalent of the language of the Act of 1875, yet, as we have

seen, this Court has recognized that when a homesteader lawfully cuts down a tree he becomes the owner of the whole tree.

The case of U. S. vs. Denver & Rio Grande R. Co., 190 Fed., 825, in so far as the expressions of the trial court relied upon here by the Court of Claims are concerned, is merely dictum and in conflict with the doctrine announced in U. S. vs. Wilson, *supra*, and by this Court in analogous cases hereinbefore cited, and with the understanding of the land department as evidenced by the Commissioner's instructions to the Chief of Field Service, *supra*, and with the general policy of the Government as hereinbefore disclosed.

The complaint in the Denver and Rio Grande case did not raise any question as to the disposition of the lops and tops resulting from timber cutting involved in that case. It was directed mainly to the cutting of timber on areas claimed by the Government not to be adjacent to the line of road, to the use of timber in changing a line from narrow to broad guage or to repair such line after the change had been made, and to the use of timber adjacent to one line for the purpose of repairing another.

The Circuit Court granted an injunction *pendente lite* (see Op., 124 Fed., 157), from which action the defendants appealed to the Circuit Court of Appeals, which, in its opinion (124 Fed., 157, at 159), stated the main questions before mentioned and two incidental or subsidiary questions, as follows:

> "(4) Had the railroad company or its agents the right to the surplus lumber arising from logs found inapplicable, on account of rot or other latent defects, to the uses of the railroad company, after they arrived at the mills, and from the side

cuts of the logs that were used for railroad purposes?

"(5) *Conceding* that the railroad company had the right to take timber from lands adjacent to its right of way for the purposes for which it was obtaining the timber in controversy, that the lands from which it was removing this timber were adjacent, and *that the railroad company was entitled to the surplus lumber after extracting from the logs the timber it needed,* was it abusing this right, wasting the timber, and recklessly or designedly creating an unnecessary excess for its own benefit or that of its agents, to the manifest injury of the Government?"

and said:

"The first four of these questions are grave and difficult. They must in any event be considered and decided at the final hearing of the case, after the *ex parte* affidavits now before us have performed their function, and the truth has been extracted by the more satisfactory process of the examination and cross-examination of the witnesses for the respective parties. In this state of the case, it is neither requisite nor fitting that these questions should be determined upon this hearing, and no opinion upon them is either formed or expressed.

* * * * *

"While counsel for the railroad company insist that the surplus lumber arising from the defective logs and from side cuts was the property of the company, they concede that it was the duty of that corporation to use economically and advantageously the timber which it took, so that the excess would be as small as possible, and the loss to the Government as slight as it could be made."

* * * * *

"It is enough to say that the evidence which the pleadings and affidavits present falls short of overcoming the legal presumption that the finding and conclusion of the Court below were right. It discloses no such mistake of fact or error of law as would warrant a reversal of the action of that Court. But on the other hand it is strongly persuasive that the *appellants were either recklessly or designedly abusing the privilege of the railroad company, and making an unnecessary and valuable surplus of lumber for their own use, to the serious injury of the Government.* A striking illustration of the course which they pursued is disclosed by one of the specifications for ties which the railroad company directed its agents to manufacture and to furnish for its use. This specification required that they 'must be full 7 inches thick and 8 inches face and 8 feet long. They will not vary more than one inch from specified length. They must be cut from perfectly sound timber and sawed free from warts. At least 80 per cent. of the ties shall be of all heart yellow pine and show no sap on either end. The balance of the ties shall not show to exceed one-fifth the area of sap at either end.' *The taking of trees of the United States to make ties of this character, so that all the remainder of the trees taken should become merchantable lumber of the railroad company or of its agents,* goes far to show a settled purpose to create an unnecessary large excess of merchantable lumber, which was not to be used by the railroad company for the purposes specified in the acts of Congress, *and to negative the claim of the appellants that they were either carefully or economically exercising the privilege of the company.* The case falls well within the established rule that a preliminary injunction maintaining the *status quo* may properly issue whenever the questions of law or of fact to be ultimately determined are

> grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small if it is granted."

It thus appears that the Circuit Court of Appeals regarded as grave and difficult, and reserved decision of, the question of the right of the railroad company to surplus lumber arising from logs found inapplicable, on account of rot or other latent defects, to the use of the company, after they arrived at the mills, and from the side cuts of the logs that were used for railroad purposes, although the tone of their language indicated that they were inclined to the view that the company had such right.

No question was raised as to the right of the railroad company to dispose of lops and tops. On the contrary, it appears that the Government complained of "the leaving of tops and lops on the ground." See 190 Fed., 856, where the lower court, referring to question 5, *supra*, said:

> "No other practices of consequence in getting out the timber for the railroad company, except the leaving of tops of trees on the ground, has been urged that need to be considered on this question."

And there was not in that case (or at least not invoked) specific authority of the land department to dispose of refuse and reciprocal agreement to pile the brush.

And the Act of 1891 was not invoked on behalf of the agents of the railroad company.

Apparently the only argument advanced was that the side cuts, slabs, and defective logs were waste and worthless to the Government.

We come, then, to the language of the lower Court relied upon by the Court of Claims (190 Fed., 856):

"The railway company and its successor had the right, under the Act of 1872, to go upon complainant's lands adjacent to its lines of railway and take therefrom such timber as was needed for construction and repair of its railroad. In doing so there would necessarily be parts of trees, when they were felled, not suitable for those purposes. Those parts remained the property of the complainants. The act only gave the right to take timber 'required for the construction and repair of its railway and telegraph line.' It did not have the right to take timber for any other purpose. It was not the purpose and intention of the grant as disclosed by its terms, that the license should extend to the taking of complainant's timber and the manufacture thereof into various kinds of lumber and the disposal thereof on the market for the benefit of the grantee. It is insisted that the parts of trees not suitable to the uses contemplated by the congressional act would be mere waste and of no value to complainants, and that therefore the railroad company and its agents were entitled to utilize trees that proved, from latent causes, to be defective and the slabs or side cuts from logs that it did avail itself of, and thus to turn them into the markets for their benefit in the way of manufactured products which it made therefrom. The argument is not convincing. By what principle has A the right to decide that certain of B's property is useless to the latter and if not devoted to some purpose it will be lost, and thus A claim the right to take it for his own benefit? At the oral argument the question was illustrated by a grant conferring a license to go upon the lands of the grantor and take timber for the making and use of rails therefrom. The grantee would certainly not have the right to make the tops of trees felled for that purpose into cordwood and then dispose of the same for his own

> use and benefit. The illustration was then thought to be apposite, and it is so believed yet. I think the record shows that these defective logs and side cuts of logs were appropriated by the railroad company's agents, defendants here, and that it further appears that for such a privilege enjoyed by said agents the railroad company received some compensation in the way of reduced prices on the ties furnished it by said agents from the logs so taken."

It is first to be observed that this is merely the expression of the district Judge on a question which the Circuit Court of Appeals had recognized as grave and difficult; and, as matter of fact, the view of the district Judge did not materialize into a decree, for, after a special master had filed a report finding the liability of the company on the whole case only about $20,000, and exceptions had been filed, a compromise settlement was made and the *suit dismissed.*

The language of the district Judge is, therefore, not judicial authority, but merely expression of individual opinion. As such, we analyze and comment upon it.

It is said that the parts of trees not suitable for the purposes of the railroad remained the property of the United States. The same might be said of timber cut by a homesteader for the purpose of building his house, but this Court has recognized that any surplus becomes his property, or rather that the whole tree becomes his property when he severs it from the realty. A much stronger case is the cutting of timber by a homesteader in clearing his land. He has no personal use for the timber, and he may never get title to the land, yet this Court has recognized that timber so cut becomes his property, and he may sell it or burn it up, if he choose.

It is further said that it was not the purpose and intention of the grant that the license should extend to the taking of timber and manufacture thereof into various kinds of lumber and disposal thereof on the market for the benefit of the grantee. As applying to the cutting of timber, that is, trees, not needed for construction purposes but cut only for profit, that proposition may be conceded; but the statement of the proposition recognizes that the right is to take timber, that is, trees, as distinguished from lumber.

If the grant were of the right to take "ties" or other specified product of trees, there might be room for the argument that surplus portions of the timber were not included and remained the property of the Government.

The Circuit Court of Appeals, however, overruling the contention of the Government, recognized the right of the railroad company to *remove the trees from the land where cut* and at convenient points manufacture required lumber therefrom.

It is further said by the District Judge that it was insisted that surplus parts of trees would be mere waste and that therefore the railroad company was entitled to realize upon them, but that such argument was not convincing, and asked, "By what principle has A the right to decide that certain of B's property is useless to the latter, and, if not devoted to some purpose, it will be lost, and thus A claim the right to take it for his own benefit?"

This misses the point, which is that the granted right is to take the trees (timber)—not merely such parts as might be utilizable for railroad construction purposes, just as the homesteader has the right (not, however, by express grant, but by implication) to take the trees themselves, although only parts thereof may be needed in the construction of his house.

The butts of trees may be manufactured into ties. The tops may be manufactured into poles and props and used temporarily in bridge or tunnel wrok. Would it be contended that after the permanent work is completed and they have served their purpose and been removed, they would revert to the United States and must be accounted for?

Certainly the Act of 1875 did not contemplate that there should be an accounting by a railroad company for surplus parts of trees, whether left on the ground or removed. The only condition, expressed or implied, in the Act of 1875 is that the tree "taken" shall be needed for construction purposes.

The District Judge concluded by citing as an apposite illustration, "a grant conferring a license to go upon the lands of the grantor and *take timber* for the making and use of rails therefrom," and observing that in such case the grantee would not have the right to make the tops of trees felled for that purpose into cordwood and dispose thereof.

The illustration is not a happy one, for it is phrased in substantially the same language as the Act of 1875 and likewise requires construction of the term "take timber," and between individuals the question would arise as to whether the right to take timber, which would mean trees, for the specified purpose, carries with it, as incidental, the right to dispose of any surplus. The specification of purpose serves only to limit the right "to take" to such trees as are suitable for that purpose.

Taking timber implies taking the trees. "Rails" are not timber (McCarley vs. State, 43 Tex., 374).

It would require more specific and limiting language than that used by the Court in phrasing its illustration to

restrict the grantee to the specific right of taking only rails from the land. See, for instance, Knox vs, Haralson, 2 Tenn., Ch. 232; Callen vs. Hilty, 14 Pa. St., 286.

Here we have not a contract between individuals but a grant by the Government of the right to take trees necessary for construction purposes and a uniform recognition of the policy and practice of the Government to permit any one who has the right to cut timber and keeps within his right to have the whole of the trees he may cut.

We submit, therefore, that where a railroad rightfully cuts a tree for construction purposes it is entitled to and becomes the owner of the whole tree and may dispose of any surplus as it sees fit.

The Railway Company Had the Right, as an Element in Fixing Their Compensation, to Grant to Its Agents, Employed to Cut Timber for It, Any Surplus of Trees Not Needed for Construction Purposes.

This proposition follows from the proposition that the railway company is entitled to any surplus of trees cut by it for construction purposes.

The claimants, therefore, aside from any right in themselves to take timber from the public lands (which will next be considered) became, through their arrangement with the railway company, vested with the right of the railway company to the tie slash.

The Claimants, as Citizens of Colorado, Were Authorized by the Act of March 3, 1891, to Take Timber From the Lands in Question for Agricultural, Mining, Manufacturing, or Domestic Purposes Within the State.

The Act of March 3, 1891 (26 Stat., 1093), provides:

> "Sec. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. And in the States of Colorado, Montana, Idaho, North Dakota, and South Dakota, Wyoming, and the District of Alaska, and the gold and silver regions of Nevada and the Territory of Utah, in any criminal prosecution or civil action by the United States for a trespass on such public timber lands, or to recover timber or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturng, or domestic purposes, under rules and regulations made and prescribed by the Secretary of the Interior, and has not been transported out of the same; but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain, provided that the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act; and he may designate the sections or tracts of land where timber may be cut; and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations; but this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for the cutting of timber on mineral lands."

This legislation was, as recognized by the land department (Bert D. White, 34 L. D., 112), in effect, extension

to public non-mineral lands, of the provisions of Section 1 of the Act of June 3, 1878 (20 Stat., 88), which reads:

> "That all citizens of the United States and other persons, *bona fide* residents of the State of Colorado or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, The provisions of this act shall not extend to railroad corporations."

And the language of the Circuit Court of Appeals (1904) in U. S. vs. Rossi, 133 Fed., 380, 383-4, directed to the Act of 1878, is equally applicable to the Act of 1891:

> "The remaining assignments of error relate to the refusal of the Court to instruct the jury that the defendants in error acted unlawfully in cutting and removing the timber and manufacturing the same into lumber for the purpose of sale and traffic out of the district where cut, in that such acts were in violation of the rules and regulations of the Secretary of the Interior. The Act of June 3, 1878, c. 150, 20 Stat., 88 (U. S. Comp.

St., 1901, p. 1528), provides, in section 1 thereof, that:

* * * * *

"This act was passed, according to the views of Secretary Teller, of the Interior Department, expressed in 1 L. D., 607, to establish by positive enactment a right claimed and exercised by lumbermen for a period of about 30 years without interference on the part of the Government—the right to appropriate the timber on Government lands, manufacture it into lumber, and furnish it to the millmen, the miners, the farmers, and other inhabitants of the district who could not or did not wish to do the actual cutting and manufacturing for themselves individually. He further said:

"The great object of the governmental supervision of the cutting of timber in those States and Territories ought not to be to compel payment for timber so cut, but to prevent unnecessary waste, the cutting of the small trees under the sized, prescribed by the department, and to prevent waste by fires and other means."

"The rules and regulations of the Secretary of the Interior in force until February 15, 1900, were in accord with these views, permitting owners of saw mills to cut the timber and manufacture it into lumber for sale, under the requirement that it be sold to citizens of the State or Territory wherein it was growing, and for 'building, agricultural, mining, and other domestic purposes.' The intention of Congress in enacting this law was to enable settlers in the regions where timber is scarce to utilize it for domestic and mining purposes, and especially to develop the mineral resources of the rough, mountainous districts, where agricultural pursuits could not be profitably followed. Whether or not this policy should be

continued to permit the carrying on of an extensive business in the manufacture and sale of lumber, not only to the miners, but for all the uses of the cities which may grow by reason of the mining industry, and without compensation to the Government for the timber required for such purposes, may reasonably be questioned. But until Congress closes the door which was so widely opened by the passage of this act, or limits its benefits to some specified amount or degree, the courts must continue to give effect to its provisions.

"It is true that the rules and regulations of the Secretary of the Interior now in force, and which have been in operation since February 15, 1900, declare, in rule 5, that:

" 'No timber is permitted to be felled or removed for purposes of sale or traffic, or to manufacture the same into lumber or other timber product as an article of merchandise, or for any other use whatsover, except as defined in Section 4 of these rules and regulations.'

"Section 4 reads:

" 'The uses for which timber may be felled or removed are limited by the wording of the act to "building, agricultural, mining, or other domestic purposes." '

"And it is contended by the plaintiff in error that rule 5 is made an integral part of the act by the wording of Section 1 thereof, and that the defendants in error have acted unlawfully in removing timber for purposes of sale and manufacturing it into lumber as an article of merchandise, in direct violation of this rule. To uphold this contention would, in effect, permit a modification and alteration of an Act of Congress by a depart-

ment charged merely with the execution of the law in question. *The rules and regulations provided by the act to be prescribed by the Secretary of the Interior were intended merely to furnish detailed instructions as to the manner of taking the timber, to prevent waste and unnecessary destruction. The land from which the timber might be taken, the objects for which it might be used, and the persons entitled to take it, were designated by Congress in the act itself. If the working out of this law has not conferred the public benefits intended, but resulted inimicably to the Government, the remedy lies with the legislative branch of the Government, the power that made the law originally, and not with the executive branch, or the judicial."*

It may be suggested here that shortly after that decision was rendered the executive, under the power to create forest reserves, threw into such reserves practically all of the public timber lands, leaving little or no timber subject to the Acts of 1875, 1878 and 1891.

As the Claimants Intended to Dispose of the Tie Slash in Accordance With the Provisions of the Act of 1891, They Became Also Grantees Thereof by Virtue of That Act, as Well as Grantees of the Railway Company's Title Under the Act of 1875.

It is alleged in the amended petition (Par. VI) that the lands where the timber was cut were designated for the purpose by the Commissioner of the General Land Office, through the Chief of Field Service, and (Par. XII) that the tie slash was to be utilized for the purposes specified in the Act of 1891 and within the State of Colorado, thus bringing the case clearly within the said act. U. S. vs. Lynde, 47 Fed., 297.

The Court of Claims quotes (Op. R., p. 10) from opinion of Assistant Attorney General Van Devanter, of November 27, 1899 (29 L. D., 322), to the effect that the Act of 1891 does not authorize the sale of timber, but overlooks the fact that that opinion went only to sale of timber *by the Secretary of the Interior* under assumed authority of that act.

The Court of Claims then quotes from the regulations under the Act of 1891, issued in 1900, 29 L. D., 572 (contemporaneously with the regulations under the Act of 1878, 29 L. D., 571, invoked by the Government in U. S. vs. Rossi, *supra*): "the cutting and removal of timber or lumber to an amount exceeding stumpage value of $50 in any one year, will not be permitted except upon application to the Secretary of the Interior and after the granting of a special permit;" and concludes: "This opinion and the regulations will show the absurdity of maintaining that under this statute the plaintiffs could acquire title to timber of the value of $26,454.90, which is the value placed upon the tie slash, the possession of which they were deprived, and acquire the title for the purpose of selling it to other parties."

The regulations of 1900, *supra*, declared that the Act of 1891 (as well as the Act of 1878) did not authorize the cutting of timber for sale to others. But in 1904 the Circuit Court of Appeals for the Ninth Circuit, in U. S. vs. Rossi, *supra*, held that such attempted restriction of the Act of 1878 was beyond the power of the land department; and in 1905 this Court, in U. S. vs. United Verde Copper Co., *supra*, applied the same principle in declaring void the provision of the same regulations declaring that timber could not be cut for smelting purposes.

In any event, inasmuch as the timber here was cut upon land designated for the purpose by the land department (Pet. Par. IX) and pursuant to instructions from the Commissioner of the General Land Office (quoted in the O'Brien letter, Pet., Par. XIII) to the effect that the railway company or its agents could lawfully dispose of any refuse, the regulations in question, if in any wise applicable, are to be considered as having been waived.

The Claimants, by Cutting the Timber, Acquired, by Virtue of the Act of 1875, or the Act of 1891, or Both, Property in the Tie Slash.

One lawfully cutting timber on public land becomes the owner thereof (U. S. vs. Cook, Shiver vs. U. S., and Stone vs. U. S., *supra*).

This is in accord with the common law that a licensee acquires title to products of the land taken by him under the license (18 Enc., 2d Ed., 1139) and (page 1148):

> "Where trees or crops are sold orally a license to enter and cut or gather them is implied from the sale. As long as the trees or crops are growing, the grant is unenforceable and the license is revocable. When they are cut, the title vests in the purchaser, and being coupled with an interest, the license is irrevocable during the reasonable time which the law gives to the purchaser within which to remove them. If some are growing and others cut, the license may be revoked *pro tanto*."

The rights conferred by the Acts of 1875 and 1891 are statutory grants, conferring license to take timber from vacant (unappropriated) unreserved public lands. They are operative as to particular land so long as it re-

mains in that category. When put in reservation, the license is withdrawn—in effect revoked; but such revocation does not affect the title of the licensee to timber cut (which vests when it is severed from the realty), or his right to enter and remove the same.

The claimants cut some of the tie slash into poles before the snows came and in the spring they and the Timber Company resumed operations, but were stopped by the Forest Service.

As alleged in the amended petition (par. XIII), by reason of heavy snow during the winter, the tie slash could not be handled and was left on the ground to be handled in the spring, and (par. XIV) on March 2, 1907, the land upon which the timber was cut was included in the Medicine Bow National Forest.

As shown, however, the tie slash had been severed from the realty and become personalty, the property of the claimants.

Although the Forest Service acquired jurisdiction of the land and the creation of the National Forest took the land out of the Acts of 1875 and 1891 and operated as a revocation of the grant or license under which the trees were cut, nevertheless the claimants remain the owners of the slash and were entitled to go on the land and cut the same into poles and props and remove them.

The Forest Service acquired jurisdiction *only* of the realty. Op. Atty. Gen., Dec. 31, 1890; 19 Op., 710.

Respectfully submitted,

WILLIAM C. PRENTISS,

Attorney for Appellants.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

L. G. CALDWELL AND J. A. DUNWODY, copartners, trading as Caldwell and Dunwody, appellants,
v.
THE UNITED STATES.
No. 325.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

Appellants sued in the Court of Claims for $26,454.90, and their petition was dismissed on demurrer.

STATEMENT OF THE CASE.

The petition alleged the following facts:

On January 4, 1906, the petitioners were appointed timber agents of the Denver, Northwestern & Pacific Railway Company, for the purpose of cutting and manufacturing railroad ties from timber on public lands adjacent to the line of railroad then under construction in Colorado, under authority of the act of Congress of March 3, 1875, granting right of way for railroads through the public domain and authorizing the taking of timber from public lands for construction purposes.

Thereafter they entered into another contract with the railway company for 150,000 additional railroad ties to be cut from the public lands adjacent to the railroad, a part of their compensation being that they were to receive the slash from such tie cutting. And under this contract they manufactured and delivered 132,428 ties, which were used by the railroad company in the construction of its lines, leaving a large amount of slash. On December 17, 1906, the petitioners agreed to sell to a timber company a large amount of this slash, and also entered into a contract with a coal company to furnish 200 cars of mining props to be cut from the slash not sold to the timber company, the purchase by both companies being for the purpose of using the slash and poles in the State of Colorado, and petitioners intended to utilize the remainder of the slash for purposes mentioned in the acts of 1878 and 1891 (which will be hereafter referred to) and in said State of Colorado. Petitioners cut some of the slash into poles on the ground, but by reason of heavy snow during the winter they could not be gotten out for delivery, and all of the slash, whether cut into poles or not, was left on the ground to be handled in the spring. Before spring, however, the land upon which the ties were cut was by presidential proclamation of March 2, 1907, included in the Medicine Bow National Forest. Thereafter the petitioners resumed the cutting of the slash into mine props in order

to carry out their contracts with the coal company, and the timber company attempted to take possession of the portion of the slash agreed to be sold to them. But this was stopped by officers of the Forest Service of the United States, who took the position that the tie slash belonged to the United States and came under the jurisdiction of the officers of the service. The officers of that service permitted the petitioners to remove the poles which they had theretofore manufactured, and also to take all the tops and refuse on a so-called fire guard of a width of 250 feet from the railroad extending for a distance of two miles. The remainder of the tie slash, over the protest of the petitioners, was taken possession of by the Forest Service and sold and the proceeds covered into the Treasury of the United States. Petitioners do not know the amount received by the United States, but aver that the value of the tie slash so taken and disposed of by Federal officers was $26,454.90. Petitioners applied to the Forest Service for reimbursement but were refused.

BRIEF.

It will be seen that this case turns upon whether the appellants, by virtue of their contract with the railroad company, became the owners of this tie slash. If not, they have no right to recover.

The railroad company had the right, through its agents, to cut and manufacture the ties which were

furnished to it by appellants under an act of Congress passed March 3, 1875, providing:

> That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public lands adjacent to the line of said road material, earth, stone, and timber necessary for the construction of said railroad.

The appellants' claim rests upon the contention that this act granted to the railway the right to the whole tree when cut down, though only a part of it could be used for railroad construction. But statutes granting privileges or relinquishing rights of the public are to be strictly construed against the grantee, and nothing passes by the grant but what is conveyed in clear and explicit language. (*Wisconsin Central Ry. Co.* v. *United States*, 164 U. S. 190; *United States* v. *Oregon, &c., Railroad*, 164 U. S. 526.) And construing this very statute this court has at least intimated that the right to take timber necessary for the construction of the railroad did not include the right to take timber for constructing rolling stock or equipment. (*United States* v. *Denver, etc., Ry. Co.*, 150 U. S. 1.) And in *United States* v.

Denver, etc., Ry. Co. (190 Fed. Rep. 825, 826) it was expressly held that the railway company acquired no title to the tops of trees as claimed in this case.

It is respectfully submitted that under no fair interpretation of this statute is the railroad given title to any timber except such as is necessary for the construction of the railroad. All other timber on the land, whether standing or consisting of parts of trees which have been used for the purpose of railroad construction remained the property of the United States. And if the railroad company had no title to this slash, it could, of course, communicate no title to appellants.

The appellants, however, rely upon the letter above quoted from the officer of the Land Office, and, in effect, insist that the result of this letter was to make a gift to them of the slash. It is sufficient answer to say that if this slash belonged to the United States, no officer of the Government had any authority to give it away. (*Steel* v. *United States*, 113 U. S. 128; *Flores* v. *United States*, 18 C. Cls. 352.)

The only other claim made by appellants is that they may rely for title upon the act of March 3, 1891 (26 Stat. 1095, 1099), which provides as follows:

> And in the States of Colorado, Montana, Idaho, North Dakota, and South Dakota, Wyoming, and in the District of Alaska and the gold and silver regions of Navada, and the Territory of Utah, in any criminal prosecution or civil action by the United States for

> a trespass on such public timber lands or to recover timber or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timberlands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes, and has not been transported out of the same.

In the present case, however, the appellants who cut the timber did not cut it for any of the purposes named. They cut it, in the first instance, for the purpose of railroad construction, as authorized by the act of 1875. They were not proposing to use the slash for any of the purposes mentioned in the act of 1891. On the contrary, the use which they proposed to make of it was to sell it and traffic with it. Whatever purpose the purchasers from them intended, it can not be said that *they* were making any of the specified uses of it. On the contrary, the sale by them expressly negatived such a purpose. Manifestly, it was not the purpose of this act to confer the right upon any one to traffic in any part of the timber upon the public lands. The contention of the appellants can scarcely be more completely refuted than by quoting from an opinion rendered by Mr. Justice Van Devanter, while Assistant Attorney General, to the Secretary of the Interior, as follows:

> There is nothing in this act which suggests that it was the purpose of Congress to thereby authorize or provide for the sale of timber on the public lands. As gathered from a careful

examination of the terms of the act, its purpose seems to have been to modify the law relating to the cutting and removal of timber from lands of the United States by denying to the Government the right then existing to demand a conviction in the criminal prosecution, or a recovery in a civil action when in any of the States, Territories, or regions named, timber is cut or removed from the public timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes under the rules and regulations made and prescribed by the Secretary of the Interior, and is not transported out of that State or Territory. * * *

I am of the opinion that the legislation under consideration does not authorize the sale of timber, and inasmuch as the regulations of March 17, 1898, *supra*, provide for sales thereof, I advise that said regulations be reformed and brought within the authority given the Secretary of the Interior by the statute under which they were prescribed.

It is respectfully submitted that there is no error in the judgment of the Court of Claims and it should be affirmed.

WILLIAM L. FRIERSON,
Assistant Attorney General.

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CALDWELL ET AL., COPARTNERS, TRADING AS CALDWELL & DUNWODY, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 325. Submitted April 23, 1919.—Decided May 19, 1919.

The provision of the General Railroad Right of Way Act of March 3, 1875, granting a beneficiary railroad company the right to take from the public lands adjacent to its line timber necessary for the construction of its railroad, must be strictly construed, and does not permit that portions of trees remaining after extraction of ties be appropriated, either as a means of business or profit or to compensate the agents employed by the railroad to do the tie-cutting. P. 19.

A grant of "timber" for purposes of railroad construction is not a grant of "trees." P. 21.

14. Argument for Appellants.

Section 8 of the Act of March 3, 1891, c. 561, 26 Stat. 1099, enacting that, in proceedings growing out of trespasses on public timber lands in Colorado and some other States, it shall be a defense that the cutting or removal was by a resident of the State for agricultural, mining, manufacturing or domestic purposes, under rules of the Interior Department, etc., but providing that nothing in the act contained shall operate to enlarge the rights of any railway company to cut timber on the public domain, gives no protection to persons who, having cut ties as agents of a railroad company under the Act of March 3, 1875, *supra*, seek to appropriate the remaining tops of the trees cut, for the purpose of sale. P. 21.

The right to take timber granted by the Act of March 3, 1875, *supra*, cannot be enlarged by a permission from an official of the General Land Office. P. 22.

53 Ct. Clms. 33, affirmed.

THE case is stated in the opinion.

Mr. William C. Prentiss for appellants:

Under various laws and conditions similar situations have been presented and uniformly, wherever a right to cut or take timber has been recognized, the right to dispose of it as incidental to its cutting or taking has followed. *United States* v. *Cook*, 19 Wall. 591; *Shiver* v. *United States*, 159 U. S. 491; *Stone* v. *United States*, 167 U. S. 178; 27 L. D. 366; 30 L. D. 88.

In all of these instances the right to cut the timber is raised as an incident and carries with it the vesting of title in the occupant to timber so lawfully cut. The right of a railroad company to take timber for construction purposes is an express grant. Taking "timber necessary for the construction of its railroad" contemplates the taking of trees. In the United States statutes the word "timber" used collectively signifies standing trees. 28 Enc., 2d ed., 537, and cases cited.

In the absence of any express provision as to the disposition of lops and tops or other surplus, the principles recognized in the cases of Indian occupants, homesteaders,

and mineral claimants furnish the only reasonable solution.

The Land Department, in its regulations under this act and the Act of June 3, 1878, authorizing the taking of timber from mineral lands (see 8 Copp's Land Owner, p. 94; 9 *id.* p. 100; 4 L. D. 150; Land Office Annual Report, 1886, pp. 446, 451, 453), did not undertake to make any declaration as to the ownership of the tops and lops of trees, but merely made provisions against waste and in avoidance of fire. It evidently regarded the tops, lops and brush all as refuse, which, if not removed, should be piled and burned.

The Land Department could lawfully authorize the taking of the lops and tops in consideration of careful piling of the brush so as to minimize the danger of forest fires, even if the lops and tops did not pass to the railroad company as part of the "timber" which it was authorized to take.

To permit the railroad companies to use the surplus tops, lops, etc., as an element in adjusting the compensation of agents employed to fell the trees and manufacture therefrom the lumber required for construction purposes, is promotive of the policy of the act and in accord with the general policy of the Government.

And final recognition by the Land Department that the right to dispose of "refuse" or "surplus" is incidental to the right to take timber for railroad construction purposes, is evidenced by the instructions of the Commissioner to the Chief of Field Service at Denver. A comparison of the language of the several acts authorizing the taking of timber from the public lands (Rev. Stats., § 5264; Acts of 1875, 1878, 1891,) shows that they contemplate the taking of trees themselves and in none of them is any notice taken of any surplus not available for the purposes specified. See Land Office Report for 1887, p. 480.

[Counsel here analyzed and criticised the opinion of the

District Court in *United States* v. *Denver & Rio Grande Ry. Co.*, 190 Fed. Rep. 825, in comparison with the earlier opinion of the Circuit Court of Appeals in the same case, 124 *id.* 159.]

It is alleged in the amended petition that the lands where the timber was cut were designated for the purpose by the Commissioner of the General Land Office, through the Chief of Field Service, and that the tie slash was to be utilized for the purposes specified in the Act of 1891 and within the State of Colorado, thus bringing the case clearly within that act. *United States* v. *Lynde*, 47 Fed. Rep. 297.

The opinion of Assistant Attorney General Van Devanter, of November 27, 1899 (29 L. D. 322), to the effect that this act does not authorize the sale of timber, went only to sale of timber by the Secretary of the Interior under assumed authority of the act.

The regulations of 1900 (29 L. D. 571, 572) declared that the Act of 1891 (as well as the Act of 1878) did not authorize the cutting of timber for sale to others. But in 1904 the Circuit Court of Appeals for the Ninth Circuit, in *United States* v. *Rossi*, 133 Fed. Rep. 380, held that such attempted restriction of the Act of 1878 was beyond the power of the Land Department; and in 1905 this court, in *United States* v. *United Verde Copper Co.*, 196 U. S. 207, applied the same principle in declaring void the provision of the same regulations declaring that timber could not be cut for smelting purposes.

Mr. Assistant Attorney General Frierson for the United States.

Mr. Justice McKenna delivered the opinion of the court.

This action was brought by appellants to recover the value of certain timber cut from the public lands of the

United States in the State of Colorado, called "tie slash" or "tie slashing," the term being used to describe the tops of trees the bodies of which have been used for making railroad ties.

The right of recovery is based upon contracts with the Denver, Northwestern & Pacific Railway Company, which had been given the right to cut timber upon the public lands adjacent to the line of its road by the Act of Congress of March 3, 1875, c. 152, 18 Stat. 482.

The Court of Claims sustained a demurrer to the petition and dismissed it. To review that action this appeal has been prosecuted.

Appellants were, in June, 1906, by due appointment of the railway company, its timber agents, to cut timber from the public lands for construction of the railroad under the act of Congress. And by agreement with the company they were given all of the "tie slash" of the trees cut down for the purpose. Pursuant to the contract, and prior to October, 1906, they manufactured and delivered to the company 88,797 ties, which left a large amount of "tie slash."

By a letter from one N. J. O'Brien, describing himself as "Chief, Field Division, G. L. O.," and expressed to be by instructions from the Commissioner of the General Land Office, there was granted to appellants authority to cut timber under the act of Congress and "to sell and dispose of tops and lops of trees that" they "may cut for construction" of the road which could not be used for road construction purposes. Inquiry first was to be made of the officers of the railway company if they would purchase the tops and lops appellants had on hand.

The letter contained a ruling of the Land Office that contractors should confine their cutting strictly to such timber as was needed by the railway company and that such "refuse" as resulted from such cutting might "be

disposed of by the railroad company or by the contractors without violation of existing law." A violation of the law, it was stated, would require a notice to the company to nullify the contract and agency and would subject the contractors to be proceeded against "as in ordinary cases of timber trespass."

Thereafter appellants entered into another contract with the company under which they manufactured additional ties and delivered them to it, and a further amount of "tie slash" was left. A large amount of this appellants agreed to sell to the Fraser River Timber Company, of Denver, Colorado, and to the Leyden Coal Company, of the same place, they sold 200 cars of mining props cut by them from the "tie slash," all to be used in the State of Colorado.

March 2, 1907, the land from which the ties had been cut was by presidential proclamation included in the Medicine Bow National Forest and the officers of the Forest Service permitted appellants to remove the poles already cut from the "tie slash" and also to have all of tops and refuse on the so-called "fireguard" 200 feet wide along the railway for a distance of two miles, but refused to allow them to have any of the remainder of the "tie slash," and took possession of and sold it; and the proceeds were covered into the Treasury of the United States. To recover the sum of the proceeds thus covered into the Treasury, or such other amount as might be found to have been received by the United States from such sale, this action was brought.

The elements for consideration are not many. The first of these is the Act of 1875, *supra*. It grants a right of way to the railway company [the grant is to railroad companies of a certain description—we make it particular for convenience] through the public lands of the United States to the extent of 200 feet on each side of its central line, and the right to take from the public lands

adjacent to its line " . . . timber necessary for the construction of said railroad." The right given is to take "timber" and this, it is argued, necessarily means "trees," and as there is no provision for disposition of what shall be left of them after using such portions for railroad purposes, it must be determined by "reason and analogy," and from these appellants argue that the railway company was entitled to the "tie slash" as incident to its right to cut under the act of Congress. They adduce *United States* v. *Cook*, 19 Wall. 591; *Shiver* v. *United States*, 159 U. S. 491; *Stone* v. *United States*, 167 U. S. 178.

The instances of the cases, however, are not in analogy to that of the case at bar. In the first the right was given to Indians as a legitimate use of land reserved by them from the cession of a larger tract to the United States, the right of use and occupancy being unlimited. The second case involved the cutting and sale of timber by a homesteader and they were considered a use of the land, his privileges with respect to standing timber being analogous to those of a tenant for life; the third case was of like kind, and the other two cases were cited. Other cases referred to by appellants struggled with the problem without solving it and we need not review or comment upon their reasoning nor consider some state cases.

The contention of appellants encounters the rule that statutes granting privileges or relinquishing rights are to be strictly construed; or, to express the rule more directly, that such grants must be construed favorably to the Government and that nothing passes but what is conveyed in clear and explicit language—inferences being resolved not against but for the Government. *Wisconsin Central R. R. Co.* v. *United States*, 164 U. S. 190; *United States* v. *Oregon & California R. R. Co.*, 164 U. S. 526. And the Government invokes the rule in the present case and cites in implied support of the invocation *United States* v. *Denver & Rio Grande Ry. Co.* 150 U. S. 1, and in express

support of it *United States* v. *Denver & Rio Grande Ry. Co.*, 190 Fed. Rep. 825, 828. And these cases were cited by the Court of Claims for its judgment.

The rule, it seems to us, is particularly applicable. There was a grant of timber by the Act of March 3, 1875, not of trees, but of timber for purposes of railroad construction, not as a means of business or of profit; nor could it be made an element, as contended, of compensation to the agents employed to cut it.

Appellants invoke the Act of March 3, 1891, c. 561, 26 Stat. 1095, 1099, in justification and as giving them a right independently of their asserted right derived through the railway company. Section 8 of that act provides that in criminal prosecutions for trespass on public timber lands in Colorado (and some other States) or to recover timber or lumber cut, it shall be a defense to show that the timber was cut or removed from the lands for use in the State by a resident thereof for agricultural, mining, manufacturing or domestic purposes under the rules of the Interior Department, and has not been transported out of the State. But it is provided that nothing in the act contained shall operate to enlarge the rights of any railway company to cut timber on the public domain, and there are other provisions giving the Secretary of the Interior the power to designate the tracts from which the timber may be cut or to prescribe the rules and regulations for the cutting.

We think it is clear that appellants are not within the provisions of the act. They are not and were not in the designated classes nor contemplated the uses which the act protects. They were agents of the railway company for so much of the timber as was to be used in railroad construction; of what was left they were simply vendors for profit. To enable them to so use the act or to use it for any but the designated purposes would be a violation of that provision of the act which forbids its operation

"to enlarge the rights of any railway company to cut timber on the public domain"; it would make the act available to a railroad as a means of profit or other purpose than road construction. And its value would be a temptation to do so. In this case it is alleged that the value of the "tie slash" that the officers of the Forest Service took possession of (it was only part of that which was cut) "was, and is, $26,454.90."

Finally, appellants rely upon the letter of the Chief, Field Division, General Land Office, *supra*. The immediate answer is that made by the Court of Claims: the want of power in the officer to enlarge the Act of March 3, 1875, and to give rights in the public lands not conferred by it.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS took no part in the decision.